

- (2) This court further declares that the plaintiff is not obliged to comply with the restriction order and the restrictions imposed upon him thereby.
- (3) The defendants do pay to the plaintiff such costs as may be taxed by a proper officer of this court on a party and party basis.

Application allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Azra Moiz*

Noorianti bte Zainol Abidin & Ors v Tang Lei Nge

HIGH COURT (KUALA LUMPUR) — SUIT NO P386 OF 1983
LIM BENG CHOON J
1 DECEMBER 1989

Tort — Negligence — Vehicle collision — Whether head-on collision — Whether collision caused by defendant's negligence

Evidence — Credibility — Test of — Evidence given by witnesses unshaken — Inherent probability or improbability of fact in issue — Conflicting versions — Approach of trial judge towards evidence

Damages (Personal Injury or Death) — Lost years — Available surplus — Sum to be deducted as living expenses — Method of assessing living expenses — Whether assessed on percentage of net prospective earnings of deceased — Civil Law Act 1956, s 8

A motor accident occurred between two vehicles along the Kuala Lumpur/Ipoh trunk road, resulting in the death of the driver and two passengers of one of the vehicles. The plaintiffs are the respective administrator and administratrix of the estate of the deceased persons who claim for recovery of damages under s 8 of the Civil Law Act 1956.

The defendant is the driver of the other vehicle involved in the collision. At the trial, he alleged that the other vehicle had encroached onto his path and collided with his car. The only witness called for the plaintiffs was the officer-in-charge of the investigation into the accident.

Held, finding the defendant wholly liable:

(1) The fact that the evidence given by the witnesses of one party was unshaken or unbroken is not per se an all sufficient acid test of credibility and the inherent probability or improbability of the fact in issue is the prime consideration.

(2) A trial judge should, in considering two conflicting stories, decide which version is inherently probable or improbable.

(3) The damages sustained by both vehicles strongly supported that there was a head-on collision. The evidence showed that the collision was caused by the defendant encroaching onto the path of the other car. It is inherently incredible that the collision was caused because the deceased driver had fallen asleep.

A (4) The damage to the front of the deceased's car was so extensive that it is highly incredible that it could have moved to the position as shown in the sketch plan. The driver was so severely injured that it is equally inherently incredible that he would have been able to manoeuvre the car to that position, had the collision taken place at or near the centre of the road as described by the defendant.

B (5) On the evidence, the court concluded that the defendant had encroached onto the wrong side of the road and this led to a head-on collision with the deceased's car. There is no contributory negligence as the deceased had no time to take any reasonable step to prevent the collision.

C (6) The sum to be deducted as living expenses is the proportion of the victim's net earnings which he spends to maintain himself at the standard of life appropriate to his case. Any sums expended to maintain for the benefit of others do not form part of the victim's living expenses and are not to be deducted from the net earnings.

Cases referred to

- D 1 *Muniandy & Ors v PP* [1966] 1 MLJ 257 (refd)
2 *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 (refd)
3 *PP v Neoh Wan Kee* [1985] 1 MLJ 368 (refd)
4 *Koay Teik Choo & Ors v R* [1956] MLJ 52 (refd)
5 *Yeoh Cheng Han v Official Administrator* [1972] 2 MLJ 7 (distr)
6 *Foong Nan v Sagadevan* [1971] 2 MLJ 24
E 7 *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774 (folld)
8 *Thangavelu v Chia Kok Bin* [1981] 2 MLJ 277 (folld)
9 *Low Kok Tong v Teo Chan Pan* [1982] 2 MLJ 299 (folld)
10 *Chan Heng Wah v Peh Thiam Choh* [1988] 1 MLJ 74 (not folld)
11 *Gammell v Wilson* [1982] AC 27 (folld)
F 12 *Harris v Empress Motors Ltd* [1984] 1 WLR 212 (folld)

Legislation referred to

Civil Law Act 1956 s 8

G Rethinasamy for the plaintiffs.
Harjeet Singh for the defendant.

Cur Adv Vult

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Lim Beng Choon J: A motor accident occurred at about 6am on 18 January 1980 along the Kuala Lumpur/Ipoh trunk road at or near to Kalumpang. As a result of the accident, the driver and the two passengers of one of the vehicles involved in the accident, a Toyota Corolla bearing registration no PQ 9782 ('the Toyota car') sustained severe injuries and they succumbed to the injuries at the District Hospital Tanjong Malim. The driver of the Toyota car was Ahmad bin Jai and the two passengers were Zainol Abidin bin Pandak Audin and Abu Bakar bin Chin. The other vehicle involved in the accident, a Mercedes car bearing registration no WP 4380, was driven by the defendant and there was a passenger in that car, one Wong Kee Nam.

The present action was brought by the respective administrator and administratrix of the estates of the deceased persons for the recovery of damages for the

benefit of the said estates, pursuant to s 8 of the Civil Law Act 1956 prior to the amendments made to it on 1 October 1984.

As the only living witnesses to the accident were the defendant and Wong Kee Nam who was called to testify for the defence, the plaintiffs could only call the officer-in-charge of the investigations of the accident, Inspector Zainol Abidin bin Mohd Sa'ad (PW5), to testify for the plaintiffs' case.

According to PW5, he was the first person to arrive at the scene about one hour after the accident. He drew a sketch plan, a copy of which was produced by him at the trial since the photostat copy of the same included in the bundle of agreed documents exh 'A' is not legible. The sketch plan shows, among other things, that:

- (a) the Mercedes car was in a drain running along the sidetable of the right half of the road as one faces towards Ipoh;
- (b) the Toyota car was straddling part of the right half of the road and the sidetable adjoining the road and it was facing towards Kuala Lumpur;
- (c) there were glass splinters scattered all over the right half of the road and the adjoining sidetable;
- (d) there were two brake marks commencing from the right half of the road to the drain where the Mercedes car had landed.

From his investigations, PW5 said that at the material time the Toyota car was travelling from Ipoh to Kuala Lumpur while the Mercedes car was travelling in the opposite direction and proceeding to Ipoh. That stretch of road where the accident took place was quite straight and there were no obstacles or potholes on the road. He drew the sketch plan in accordance with what he saw at the scene upon his arrival there. He said that the glass splinters came from both the vehicles involved in the accident. He could not find any brake marks made by the Toyota car. He knew that the driver of the Mercedes car was charged for a driving offence relating to the accident but he was however given a discharge not amounting to an acquittal. This witness also produced a chemist's report and two RIMV reports pertaining to the damages sustained by the Toyota car and the Mercedes car respectively.

Counsel acting for the plaintiffs and the defendant agreed to include the aforesaid documents in exh 'A'. The RIMV report of the Toyota car shows that the front part of the car was very badly damaged. The RIMV report of the Mercedes car likewise shows that its front part was also damaged. The extent of the damage of the front part of the Mercedes car, as described in the said RIMV report, is as follows:

- (1) Keadaan kereta keseluruhannya hangus oleh kebakaran.

- (2) Badan hadapan sebelah kanan remuk ke dalam.
- (3) Madgad hadapan sebelah kiri dan kanan remuk.

The chemist's report said that the damage to the front of the Mercedes car was due to a collision prior to the fire. It was also found that the front of the Toyota car was badly damaged. Photographs of the damaged vehicles also confirmed that the front parts of both the vehicles were badly damaged.

- The defendant, in his evidence, said that he woke up at 3am on the morning of 18 January 1980 as he had arranged with his friend, Wong Kee Nam, to go to Ipoh. He left his house at 4am to drive to Wong's house at Sungei Buloh. From there he and his friend who sat beside him proceeded to Serendah where they had a drink. Thereafter they proceeded along the KL/Ipoh trunk road. When they were about to reach Kalumpang, he saw a car coming from the opposite direction. The said car was about one mile away. When it was about half a mile in front of him, the said car encroached on to his path and continued to travel to the sidetable on his side of the road. After the said car had gone on to the sidetable, it continued to proceed along the sidetable. The defendant thereupon moved his Mercedes car near to the centre of the road. When he was about to pass the said car, it suddenly came out from the sidetable and knocked against the Mercedes car. The point of collision was on the front part of the Mercedes car. He then swerved his car to the right. He shut his eyes and upon opening his eyes he found that his car had landed in a drain. It was on fire and he managed to get out with his friend before his car exploded and became engulfed in flames. He lodged a report at the Kalumpang Police Station at about 10.50am the same morning and his report was enclosed at p 19 of exh A. He also said that he had been a driving inspector for over ten years prior to the accident. Finally he said that although his car was insured against accident, his insurers had discharged themselves. His counsel informed this court that the insurers of the Mercedes car, Supreme QB Insurance Co had already been wound up and they were not interested in defending this case.

- Wong Kee Nam, DW2, in his evidence, said almost the same thing in his description of how the accident occurred.

- It is useful to pause here for a moment to say a few words regarding the approach which a trial judge should adopt in evaluating the evidence adduced at a trial. It has been stated in numerous cases that the fact that the evidence given by the witnesses of one party was unshaken or unbroken is not per se an all sufficient acid test of credibility and that the inherent probability or improbability of the fact in issue must be the prime consideration — see for instance *Muniandy & Ors v PP*,¹ *Dato Mokhtar bin Hashim v PP*² at p 247 and *PP v Neoh Wan Kee*³ at p 372. It has also been said that a trial judge should not approach

the case upon the basis of deciding which of the two conflicting stories he should believe but rather on the basis of considering which version is inherently probable or improbable — see for instance *Koay Teik Choo & Ors v R*.⁴ With these principles in mind I shall now assess the evidence in the present case.

Now it has been suggested that the driver of the Toyota car must have fallen asleep, unconsciously veered his car on to the path of the defendant, went on to the sidetable and slowly proceeded along the sidetable before it suddenly dashed out to collide with the defendant's Mercedes. It is to be noted that there was a small bridge (jambatan) marked with the letter 'K' in the sketch plan leading from the edge of the sidetable marked with the letter 'A' to the kampong beyond. This indicates that there was either a small stream, or a drain running alongside the sidetable. If the driver of the Toyota car was sound asleep and unconsciously veered his car to his right he would have, more probably than not, plunged into the stream or the drain; it is inherently incredible that he would be able to get on to the sidetable and continue to proceed slowly along it for some time before dashing out to collide with the Mercedes car. Another argument that might have been but was not put forward is that the driver of the Toyota car might have been awakened upon reaching the sidetable and he could therefore stabilize his car and proceed slowly along the sidetable. If that be the case it is equally incredible that he would be so foolhardy as to dash out from the sidetable since he would have seen the Mercedes car with its flashing lights and headlights on quite clearly at the material time.

In the second place, apart from the driver there were two passengers in the Toyota car. The version of the defence could only happen if all the three persons were asleep because if any one of the two passengers was awake he would have alerted the sleeping driver to stabilize the car in time to avoid its encroachment on to the wrong side of the road. Even assuming that the fully awake passenger could not alert the sleeping driver in time to prevent the encroachment, the collision could only have occurred on the left half of the road as one faces the direction of Ipoh.

In the third place, the damages sustained by both vehicles strongly supported that there was a head-on collision between the two vehicles. PW5 who was in charge of the investigation said so in his evidence. The chemist in his report also said the same thing.

Finally, from the sketch plan one can discern that the glass splinters were strewn on the right half of the road. The brake marks of the Mercedes car also commenced on the right half of the road and stretched over a distance of some 37 to 40 ft. More importantly, the Toyota car was found lying on its correct side of the road and facing the direction of Kuala Lumpur. All these clearly show that

A the head-on collision was caused by the defendant's car encroaching on to the path of the driver of the Toyota car. Counsel for the defence contended that the position of the Toyota car as shown in the sketch plan could afford absolutely no proof as to its position on the road immediately before or at the moment of the collision. He relied on the case of *Yeoh Cheng Han v Official Administrator*⁵ and the Federal Court case of *Foong Nan v Sagadevan*⁶ to support his contention. Now let us see what the learned judge in the *Yeoh Cheng Han* case⁵ has to say. The relevant passage appears in p 9 of the reported case and it reads:

C It is to be observed that there was no evidence that the plaintiff went to the wrong side and knocked into the deceased. It was never put to him in cross-examination that he had done so. It is true that both vehicles were found on the wrong side but, as has been said in these courts again and again, the position of the vehicles after the accident can afford absolutely no proof as to their respective positions on the road immediately before or at the moment of collision, *unless there is the clearest evidence to show that the vehicles involved in the accident stopped dead upon impact*; and there was no evidence to that effect in the present case. As to the broken pieces of lamp glass, there was no evidence to show whether the lamp was shattered on impact or after the vehicle had fallen. (Emphasis is mine.)

E The Federal Court in *Foong Nan*⁶ held the same view when it said at p 25 of the related case:

F I regret to say that I do not think such a conclusion is sustainable for the reasons given. In my view the position of the vehicles after the accident can afford absolutely no clue, *in this case*, to their respective positions on the road immediately before or at the moment of the collision. The vehicles could not have instantly stopped dead upon impact, but the heavier vehicle must by its greater momentum have pushed the lighter one backwards.

G In the present case, the damage to the front of the Toyota car was so extensive that it is highly incredible that it could have moved to the position as shown in the sketch plan. More importantly, the driver of the Toyota car was so severely injured that it is equally incredible that he would be in a position to manoeuvre the said car to the position as shown in the sketch plan had the collision taken place at or near the centre of the road as described by the defendant. It must also be noted that there was no one at the scene at the time of the accident except the defendant and his friend Wong. It is highly improbable that the Toyota car could have been moved to the position as shown in the sketch plan by someone, least of all by the defendant and Wong. PW5 was the first person to arrive at the scene and he found the Toyota car lying in that position. The only conclusion that one can arrive at is that immediately upon impact the Toyota car must have been thrown backwards and stopped at the position shown in the sketch plan.

I Turning to the evidence of the defendant, one may recall that he said that immediately upon impact he swerved his car to his right and shut his eyes until his car finally

landed in the drain on the right half of the road. No reason was given as to why he should choose to shut his eyes immediately after the impact. Had he been the passenger in the Mercedes, such an assertion might perhaps be acceptable but as a driver such a behaviour is highly unnatural and irrational. It is worthy of notice that in his report lodged at the police station some four hours after the accident (the English translation of which is included in exh 'A'), he said that when he reached (the place where the accident occurred) a car came from the opposite direction in an unsteady manner, encroached on to his path and thus he collided on to the said car. His car (then) went into a drain on the right side of the road. In answer to questions posed to him by counsel for the plaintiffs, he said that he did mention in his report about the Toyota car encroaching on to his path but he did not give details of how the accident happened. The policeman who took it down could not understand him because as stated by him in examination-in-chief, he used broken Bahasa Malaysia to lodge the report. But at the early stage of the cross-examination, he said that as a driving instructor he had some Malay students and he could converse with them in Malay. In my scrutiny of this part of his evidence, I have two observations to make. Firstly, if he could competently instruct his Malay students by using the normal and kampong Malay language, I cannot understand why he should have any difficulty in saying what he really wanted to say in Malay to the policeman when he lodged the report. Secondly, although I cannot expect him to give a detailed account of how the accident occurred, nevertheless he should mention the material facts in his report. His failure to mention that after encroaching to his path the Toyota car proceeded to the sidetable or edge of the road before turning round to collide with his car is an element which I cannot ignore in my evaluation of the totality of the evidence in the present case.

I now come to the evidence of DW2, the passenger in the Mercedes car. Bearing in mind that the accident happened some nine years ago and the denial made by this witness that he had discussed this accident with the defendant before he gave his evidence, it is amazing that he could relate to this court the exact time the defendant arrived to fetch him for the trip to Ipoh, the exact time they arrived at Serendah, the exact time they left Serendah and the speed of the Mercedes car, all of which were the same as what the defendant had said in his evidence. It is equally amazing that he could recapitulate the events that took place prior to and at the time of the accident with such ease and without having to take time to think. From my observation of the quality of his evidence and the way he gave it, I have no doubt that the two witnesses for the defence had an understanding of a sort resulting in DW2 repeating the defendant's assertions verbatim. I therefore cannot give much value to his evidence.

Upon the ultimate analysis of the evidence as a whole, I am of the view that the defendant had encroached on to the wrong side of the road and this led to a head-on collision with the Toyota car. Bearing in mind that both vehicles were travelling on a country road where there was no speed limit, there is no doubt that both the vehicles were travelling at a fast speed. This proposition is supported by the extent of the damage sustained by both the vehicles, more particularly by the Toyota car. That being the case, the collision must have occurred a few seconds after the encroachment of the defendant and the impact was so great that the Toyota car was pushed back on to the position as shown in the sketch plan. Under such circumstances, the question of contributory negligence does not arise as the defendant has no right to complain when it was he who placed the driver of the Toyota car in the agony of a collision whereby the latter had no time to take any reasonable step to prevent the collision. I therefore held that the defendant is wholly liable.

I shall now turn to the assessment of damages. From the statement of claim, the reliefs relating to damages sought are:

- (1) Special damages comprising costs of taking out letters of administration to administer the estate of each of the deceased and funeral expenses.
- (2) Damages on behalf of the estate of each of the deceased for lost years under s 8 of the Civil Law Act 1956.
- (3) Damages for loss of expectation of life for each of the deceased.
- (4) Interest

The claim for damages on behalf of the dependants of the three deceased under s 7 of the said Act has been abandoned. Special damages for the estate of each deceased have been agreed in the sum of \$1,250. For the lost years claim, the parties have also agreed that the monthly earnings of:

- (a) Zainol Abidin bin Pandak Audin (first deceased) was \$1,055;
- (b) Ahmad bin Jai (second deceased) was M\$502; and
- (c) Abu Bakar bin Chin (third deceased) was M\$680.

It has been judicially accepted that a claim for damages for the lost years can only succeed if the following two conditions have been satisfactorily established:

- (i) there must exist on the evidence presented to the court a pre-accident income of the deceased; and
- (ii) from this income there must be a monetary sum which the deceased would have been able to save after the deduction of an estimated sum to represent his probable living expenses.

The aforesaid conditions advocated in *Pickett v British Rail Engineering Ltd*⁷ was adopted by our courts — see

*Thangavelu v Chia Kok Bin*⁸ and *Low Kok Tong v Teo Chan Pan*.⁹ In the present case, there is no difficulty as regards the first condition since the parties have agreed that each of the deceased was earning the monthly income as set out earlier. As to the second condition, the evidence adduced to support the probable living expenses of each of the deceased is this. The widow of the first deceased (PW1) said that her late husband used to give her \$400. The monthly rental of the house where they resided was M\$65. The first deceased sometimes went for 'outings'. The widow of the second deceased (PW2) said that prior to her husband's death she was given \$300 per month for household expenses. They too stayed in a rented house and the monthly rental was \$70. The father of the third deceased said that he received \$300 monthly from his son. I must say that to assess the living expenses on such meagre evidence is extremely difficult. However that may be I cannot shun from assessing the damages under this head bearing in mind that although 'the assessment of living expenses may no doubt sometimes present difficulties but certainly no difficulties, which would be insuperable for the courts to resolve' (per the judgment of Lord Salmon in the *Pickett* case⁷).

Counsel for the defendant suggested that I should adopt the approach advocated by Thean J in *Chan Heng Wah v Peh Thiam Choh*.¹⁰ In that case, the learned judge followed the English cases and took a percentage (40%) of the net prospective earnings of the deceased victim as the available surplus on which the assessment for the lost years was made. Counsel for the defence in the present case therefore suggested that I too should take 40% of the net prospective earnings of each of the deceased to assess the damages under this head. With respect, I think the suggested percentage is arbitrarily drawn and I am not prepared to accede to such a suggestion. In any case, Thean J in *Chan Heng Wah*'s case¹⁰ said:

These percentages are a good guide to us but obviously cannot be followed rigidly.

It is more preferable to follow the guideline proffered by Lord Scarman in *Gammell v Wilson*¹¹ at p 78 where he said:

The loss to the estate is what the deceased would have been likely to have available to save, spend, or distribute after meeting the cost of his living at a standard which his job and career prospects at time of death would suggest he was reasonably likely to achieve. Subtle mathematical calculations based as they must be on events or contingencies of a life which he will not live, are out of place: the judge must make the best estimate based on the known facts and his prospects at time of death.

I must also bear in mind that the ingredients that go to make up living expenses are the same whether the victim be young or old, single or married, with or without dependants. The sum to be deducted as living expenses is the proportion of the victim's net earnings which he spends to maintain himself at the standard of life appropriate to his

A case and any sums expended to maintain others do not form part of the victim's living expenses and are not to be deducted from the net earnings — per judgment of O'Connor LJ in *Harris v Empress Motors Ltd*¹² at p 228. It is with this attitude that I now proceed to assess the damages under this head.

B Doing the best I can my assessments are as follows. With regards to the first deceased, he was a postal clerk and had a steady income of \$1,055 per month. To be able to give his wife a sum of \$400 and live in a rented house for which he paid a monthly rental of \$65, it would appear to me that his living expenses were relatively modest. C However, I must in assessing his living expenses, take into consideration the cost of his housing, food, clothing, travelling expenses and a modest amount of entertainment and social activity. The total cost of all these items in my view could not be more than \$400 per month. The quantum of his net 'savings' is therefore \$655 which I will round up to \$600 per month. I will give 11 years' purchase (which both counsel has agreed to be a reasonable figure). D My award under this head according to the annuity table is therefore \$59,807 (round figure).

As to the second deceased, he was a postman drawing a steady income of \$502 per month, out of which he gave his wife a monthly allowance of \$300 towards household expenses. The monthly allowance which he gave to his wife is likewise indicative that he was not a spendthrift and he lived within his means. Taking into account the same items in respect of his living expenses as I have done in the case of the first deceased and taking into consideration F that he was only a postman and would unlikely be involved in extravagant entertainment and social activities, I think his living expenses could not be more than \$250 per month. This will leave his available surplus in the sum of \$250 per month (round figure). With a multiple of 16 as agreed, the award under this head pursuant to the annuity G table is \$32,513 (rounded up).

The third deceased was also a postal clerk drawing a steady salary of \$680 per month. He appeared to be a bachelor but he gave to his father between \$300 to \$500 per month. His father may well have exaggerated as to the allowance given to him by his son, nevertheless his unchallenged assertion is indicative that the living expenses of the third deceased were also quite modest. However, as a bachelor, his entertainment and social activities would cut more deeply into his net income. My assessment of his living expenses is therefore \$380 per month, leaving \$400 as the available surplus. With the agreed multiplier of 15, H the award I give is \$49,822 (round figure).

I As regards the claim for loss of expectation of life, the conventional award of \$5,000 is a reasonable sum for each of the deceased persons. As regards interest, I allow interest at the rate of 4% pa in respect of the special damages from the date of the accident till date of judgment

and thereafter the interest will be at 8% pa until realization. Costs of the proceedings are to be paid by the defendant to the plaintiffs.

Order accordingly.

Solicitors: *Rethina & Co; Shearn Delamore & Co; Drew & Napier.*

Reported by *Zarinah Marican*

Bumiputra Merchant Bankers Bhd v Supreme-QBE Insurance Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO
C23-281-86
VC GEORGE J
4 MARCH 1988

Companies and Corporations — Ultra vires — Whether defendant had power to issue letter of indemnity — Whether issue of letter of indemnity within the ordinary business of the defendant — Burden of proving letter of indemnity outside ordinary business of defendant — Companies Act 1965, ss 19(1)(c), 20(1), (2) & Third Schedule

The plaintiff and the defendant entered into an agreement whereby the plaintiff agreed to provide bankers' guarantee on behalf of the defendant's clients from time to time. It was further agreed that any guarantees issued by the bank in favour of the defendant's customers would be 'counter-guaranteed' by the defendant, whereby the defendant guaranteed the plaintiff payment of the amounts guaranteed by the plaintiff on behalf of the defendant's customer. One such guarantee was issued by the plaintiff on behalf of the defendant's customer, Dirikon, in favour of British American. The defendant in turn issued the plaintiff with a letter of indemnity. Dirikon, in breach of its agreement with British American, failed to repay loan moneys extended by British American, and the plaintiff was called upon to honour its guarantee. The plaintiff, accordingly, paid up on the British American guarantee and in turn demanded payment from the defendant pursuant to the letter of indemnity issued by the defendant.

The plaintiff made an application under O 33 r 2 of the Rules of the High Court 1980 for certain issues to be tried as preliminary issues. The four issues were:

- (1) Whether the defendant had, by virtue of s 19(1)(c) of the Companies Act 1965, read together with the Third Schedule to the Act, power to issue the letter of indemnity in favour of the plaintiff.
- (2) Whether the defendant had power under its memorandum of association to issue the letter of indemnity.
- (3) Whether, by virtue of s 20(1) of the Companies Act 1965, the defendant's act in issuing the letter of indemnity is not valid by reason only that the defendant allegedly did not have capacity or power to issue the same.
- (4) Whether, by virtue of s 20(2) of the Companies Act 1965 and in view of the answers to (1), (2) and (3) above, the defendant is barred from asserting or relying on the matters raised in

A paras 7, 8 and 9 of its defence stating that the letter of indemnity was not in the ordinary business of the defendant.

Held, deciding the preliminary issues in favour of the plaintiff:

(1) It was unarguable that the defendant had the capacity and power to enter into the letter of indemnity as it was doing something within the ambit of its objects as set out in the memorandum of association. In any event, s 20(1) of the Companies Act 1965 abolished the effect of the ultra vires doctrine. The answer to the first three questions was in the affirmative.

(2) As regards the fourth question, the defendant could not rely on any of the exceptions under s 20(2) of the Companies Act 1965.

(3) The transaction was part of the ordinary business of the defendant and art 59(b) had no relevance for the following reasons:

- (a) the burden of proving that the transaction was not in the ordinary course of business of the defendant was on the defendant as it was asserted by the defendant and the defendant had not sought to prove that the transaction was outside the ordinary business of the defendant;
- (b) the transaction fell within the express objects of the defendant company as set out in its memorandum of association. In the absence of evidence to the contrary, those objects for which a company are established as set out in its memorandum of association set out the ordinary course of business of the company.

(4) As the disposal of the preliminary issues substantially disposed of the cause of action and renders a trial unnecessary, pursuant to O 33 r 5 of the Rules of the High Court 1980, the defendant was ordered to pay the plaintiff the amounts covered by the letter of indemnity.

[*Editorial Note:* The defendant has appealed to the Supreme Court vide Civil Appeal No 107 of 1988.]

Cases referred to

- 1 *Re Horsley & Weight Ltd* [1982] 3 All ER 1045 (refd)
- 2 *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1985] 3 All ER 52 (refd)

Legislation referred to

Companies Act 1965 ss 19(1)(c), 20(1), (2), Third Schedule
Rules of the High Court 1980 O 33 r 2

T Thomas (Tunku Alina Raja Muhd Alias with him) for the plaintiff.

G Sri Ram (R Lazar with him) for the defendant.

Cur Adv Vult

VC George J: By an agreement in writing dated 30 July 1980 (the 'July 1980 agreement') entered into between the plaintiff ('the bank') and the defendant ('QBE'), the bank agreed to provide at the instance of QBE bankers guarantees in favour of clients of QBE. What was envisaged was that from time to time customers of QBE would approach QBE for guarantees. QBE in turn would require the bank to provide the guarantee needed by their clients. It was agreed between the bank and QBE that any guarantee issued by the bank at the instance of QBE would be 'counter-guaranteed' by QBE — in other words QBE